

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

MELIO VAZQUEZ

PLAINTIFF

V.

CIVIL ACTION NO.2:04CV354-WAP-JAD

DESOTO COUNTY JAIL, ET AL

DEFENDANTS

REPORT AND RECOMMENDATION

The undersigned has considered the motion of the Officer Nathan Pennington to dismiss or for summary judgment (Doc. 32).

Vasquez' complaint, under oath, alleges that Pennington charged him, grabbed him by the collar and maced him. Vasquez claims he was forced into his cell and beaten about the head and kicked. He does not identify the attacker, other than to say Pennington, Hambric and Mitchell were all present when he could see again. He indicates Hambric was taken to the emergency room for an x-ray of this hand. Hambric is reported to have said his hand might be broken. He says all he did was ask for a towel and claims he did nothing to provoke an attack.

Pennington submits the reports he made at the time of the incident and his affidavit that at the time of the incident he was not carrying a baton, billy club, or handcuffs. He states under oath that he never hit Vazquez with his fist, open hand or any part of his body. According to Pennington, Vasquez profanely demanded to know when he would get a towel; profanely demanded that Pennington get him a towel; and when ordered by Pennington to come down some stairs, profanely refused and told Pennington to come get him down. Pennington says he caught Vasquez' foot as he attempted to kick Pennington in the face. Pennington describes spraying Vasquez in the face with "Freeze+P" for one second. Vasquez was taken down to the floor by Pennington. He was taken to

his cell by Pennington and other officers. When he started to fight again, he was again subdued. He was then seen for injuries.

Vasquez claims that Pennington used excessive force. In the face of these widely divergent recounting of events, there are disputes of material fact to be determined at trial. The fact finder will have to weigh the credibility of the parties and witnesses in order to make a determination of the reasonableness of the use of force. Therefore the undersigned recommends that the motion for summary judgment be denied.

The parties are referred to 28 U.S.C. 636(b)(1) and Local Rule 72.2(D) for the appropriate procedure in the event any party desires to file objections to these findings and recommendations. Objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed finding and recommendations contained in this report within ten days from the date of filing will bar an aggrieved party from challenging on appeal both the proposed factual findings and the proposed legal conclusions accepted by the district court *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

Plaintiff is directed to acknowledge receipt of this report and recommendation by signing the enclosed acknowledgment form and returning it to the court within ten days of this date. Plaintiff is warned that failure to comply with the requirements of this paragraph may lead to the dismissal of this lawsuit under F.R.Civ.P. 41(b) for failure to prosecute and for failure to comply with an order of the court.

This the 15th day of June, 2006.

/s/ JERRY A. DAVIS
UNITED STATES MAGISTRATE JUDGE